No. 87-512

In the Supreme Court

OF THE

United States

OCTOBER TERM 1987

DAVID BERRY'AN,
Petitioner,

VS.

HUGHES AIRCRAFT COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEANNE P. GEORGE
*KEITH M. PARKER
TIMOTHY J. DONNELLY
LATHAM & WATKINS
650 Town Center Drive
Suite 2000
Costa Mesa, CA 92626
(714) 540-1235
Attorneys for Respondent

*Counsel of Record

October 21, 1987

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600

QUESTION PRESENTED[1]

Did the court below err in affirming the district court's judgment for respondent after trial on petitioner's claims of race discrimination in employment brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e — 2000e-17, and the Civil Rights Act of 1866, 42 U.S.C. § 1981?

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[1]The parties to the proceeding below were petitioner David Berry'an and respondent Hughes Aircraft Company. The individual defendants set forth in the caption were dismissed by the district court prior to trial.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Hughes Aircraft Company ("HAC") respectfully requests that this Court deny the petition of David Berry'an ("Berry'an") for a writ of certiorari, seeking review of the decision and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 19, 1987.

OPINION AND JUDGMENT BELOW

The opinion of the court of appeals (an unpublished memorandum decision) and the findings of fact and conclusions of law of the United States District Court for

the Central District of California are reproduced in the Appendix hereto.

STATUTES AND RULES INVOLVED

The Civil Rights Act of 1866, 42 U.S.C. § 1981 and pertinent parts of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e — 2000e-17 are set forth in the Appendix hereto.

I

STATEMENT OF THE CASE

Berry'an's statement of facts to this Court contains numerous assertions not supported by the evidence and directly contrary to the findings entered by the trier of fact. HAC will not attempt to respond to each instance in which Berry'an has departed from the record below, because the question before this Court is whether this action raises any issue which merits this Court's review. HAC therefore submits only a brief summary of the facts of this case prior to addressing the foregoing question.

Berry'an was employed by HAC from June 2, 1975 to June 17, 1983, when he was laid off. Berry'an filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") in July 1983 and, in June 1984, the EEOC issued Berry'an a right to sue letter. On August 8, 1984, Berry'an filed a complaint against HAC, alleging that he suffered racial discrimination during his employment with HAC. Specifically, Berry'an claimed that because of his race (black) he was terminated from his job, denied a transfer, passed over for salary increases and harassed at his work place.

After a bench trial, the district court granted judgment for HAC. The district court found that Berry'an had failed to establish a *prima facie* case of race discrimination in connection with the termination, transfer and salary decisions, and further that even had Berry'an established a *prima facie* case, HAC had articulated a non-discriminatory reason for its conduct and Berry'an had failed to meet his ultimate burden of proving that HAC's articulated reason was pretext for a discriminatory motive. In addition, the trial court found that Berry'an failed to prove a continuous and extensive course of harassment directed against him because of his race.

With respect to Berry'an's claim of discriminatory termination, the evidence overwhelmingly showed and the trial court found that Berry'an was laid off because he had a long history of attendance problems. Numerous supervisors testified that Berry'an arrived late, left early and was absent from his work station for long periods of time. The trial court noted that it strongly believed the supervisors who unanimously asserted that they did not discriminate against Berry'an. Performance appraisals and other documents detailed Berry'an's attendance problems. Berry'an did not present any credible evidence at trial that he was laid off because of his race. Instead, he simply asserted that he was performing satisfactorily and, therefore, his layoff must have resulted from discrimination. What little evidence Berry'an offered to support his claim actually confirmed his serious attendance problems.

With respect to Berry'an's claim that he was denied a transfer because of racial discrimination, Berry'an offered evidence at trial of only five positions at HAC for which he had applied. While he initially asserted that he was qualified for all five of these positions, on cross

examination Berry'an admitted that he did not have the training or experience required for any of these positions. The evidence showed and the district court concluded that Berry'an had produced no evidence that he was denied a transfer because of his race.

Evidence relating to Berry'an's claim that he was passed over for salary increases in March 1982 and 1983 because of racial discrimination actually demonstrated that Berry'an had received regular annual salary increases throughout his employment with HAC, including a 10% increase in March 1981 and a 26% increase in December 1981. The trial court found that Berry'an did not receive an increase in March 1982 because of his substantial increase in late 1981, and did not receive an increase in March 1983 because of his serious attendance problems which compromised the quality of his work.

Finally, Berry'an's claim of racial harassment was found by the trial court to be without merit. In attempting to prove a continuous and extensive course of harassment, Berry'an produced evidence of only one instance of alleged harassment — an arguably derogatory document anonymously sent to Berry'an in the inter-office mail — which Berry'an admittedly never called to the attention of his supervisors. Except for his own testimony, Berry'an offered no evidence that HAC falsely accused him of maintaining poor work habits, while HAC produced numerous credible witnesses who testified that Berry'an had poor work habits.

The district court's evaluations of the credibility of the witnesses was extremely significant in this case. Berry'an alleged that his performance was excellent, that his attendance was exemplary, and that his supervisors were falsely accusing him of attendance problems. This testimony is impossible to reconcile with that of his supervi-

sors, who consistently testified that Berry'an habitually arrived late, left early, and took long unauthorized breaks during the work day. To believe Berry'an would require this Court to believe that all of the supervisors were lying when they wrote their appraisals and testified at trial. The district court concluded that it believed the supervisors.

II

REASON REVIEW SHOULD BE DENIED

This action and the decision below do not present any question suitable for this Court's review. The fundamental premise of Berry'an's appeal to the Ninth Circuit was that the trial court erred by failing to resolve in his favor the conflicts between his testimony and that of other witnesses. Berry'an makes essentially the same argument to this Court; his argument does not raise any important questions of law, nor has Berry'an pointed to any conflict between the circuits which is raised by the proceedings herein. In fact, Berry'an raises no question of law, but merely requests this Court to yet again review the facts of this case.

In considering Berry'an's Title VII claims, the trial court properly followed the guidelines for allocating the burden of proof and production of evidence in a Title VII case set forth by this Court in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792 (1973) and further explained in *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The trial court found that Berry'an failed to establish a *prima facie* case of discrimination under Title VII with regard to the termination, transfer and salary decisions. Alternatively, the court found that even assuming that Berry'an had proved a *prima facie* case of discrimination, HAC's ar-

ticulated reasons for his actions successfully rebutted Berry'an's showing, and Berry'an failed to carry his ultimate burden of proving that HAC's reasons were a pretext for a discriminatory motive.

With respect to Berry'an's discriminatory harassment claim, the district court found that Berry'an failed to prove a continuing and extensive course of harassment directed against him because of his race, or that any of his supervisors at HAC were aware of alleged harassment by co-employees which they failed to remedy. *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978). In sum, the trial court found that Berry'an did not establish any violation of Title VII or Section 1981 by defendant HAC and was therefore not entitled to any relief.

The Ninth Circuit affirmed. In reaching its decision, the Ninth Circuit concluded that because the case was fully tried, review should focus on the ultimate issue of discrimination, not on whether a *prima facie* case was established. *United States Postal Service v. Aikens,* 460 U.S. 711, 715 (1983); *Casillas v. United States Navy*, 735 F.2d 338, 343 (9th Cir. 1984). The Ninth Circuit found that the district court's conclusion that Berry'an had failed to meet his burden of demonstrating race discrimination was not clearly erroneous.

Nothing in the Ninth Circuit's treatment of these issues raises a question that this Court should consider. As this Court observed in *Anderson v. City of Bessemer City*, ____ U.S. ____, 105 S.Ct. 1504, 1511-12 (1985),

> [b]ecause a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court's finding of discrimination is that set forth in Federal Rule of Civil Procedure 52(a): "Findings of fact shall not be set aside unless

> clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."
>
> . . .
>
> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be the " 'main event' . . . rather than a 'tryout on the road.' " *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977). For these reasons, review of the factual findings under the clearly-erroneous standard — with its deference to the trier of fact — is the rule, not the exception.

In his petition for writ of certiorari, Berry'an once again asserts that the evidence adduced at trial established a *prima facie* case of discrimination. Having failed to persuade the district court and the court of appeals that the facts support his claim, Berry'an is not now entitled to a third review of such facts by this Court.

III

CONCLUSION

HAC respectfully submits that Berry'an has wholly failed to sustain his burden of establishing under Rule 17 of this Court's rules that there are special and important reasons why review should be granted. The decision below does not involve an important question of federal law which should be settled by this Court. The Ninth Circuit's decision is in complete accord with decisions of other courts of appeals and this Court. Indeed, Berry'an raises no question of law at all, but rather seeks yet another review of the facts of this case. For the foregoing reasons, HAC respectfully requests that Berry'an's petition for writ of certiorari be denied.

Dated: October 21, 1987

Respectfully submitted,

DEANNE P. GEORGE
KEITH M. PARKER
TIMOTHY J. DONNELLY
LATHAM & WATKINS
650 Town Center Drive
Suite 2000
Costa Mesa, CA 92626
(714) 540-1235
Attorneys for Respondent

APPENDIX

42 U.S.C. 1981

§ 1981. Equal Rights Under the Law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 2000e — 2000e-17 (in pertinent part)

§ 2000e-2. Unlawful Employment Practices.

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

DAVID BERRY'AN,
Plaintiff,
VS.
HUGHES AIRCRAFT COMPANY, a corporation;
THOMAS W. TONG; D.M. SUGDEN; A.H. RUYSSER;
EDWARD KULYESHIE; GERALD HERMANN; and
DOES 1 through 10, inclusive,
Defendants.

Civil No. CV 84-6158 WDK

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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This action was brought on for trial before this Court, the Honorable William D. Keller presiding, on November 12, 1985. The Court having examined the pleadings, files and records of this action, having considered the evidence introduced at trial and having heard the arguments of counsel, makes the following findings of fact and conclusions of law:

I

FINDINGS OF FACT

[The Parties and Procedural Background]

1. Defendant Hughes Aircraft Company ("HAC") is a corporation with its principal place of business in Los Angeles County, California. Generally speaking, HAC is engaged in the research, development and manufacture of products for the defense and aerospace industries.

2. Plaintiff David Berry'an ("plaintiff"), a black male, was hired by HAC on June 2, 1975 as a Student Engineer. Plaintiff worked in a number of different departments within HAC until he was laid off for lack of work from his position as a Test Engineer with HAC's Space and Communications Group on June 17, 1983.

3. On July 12, 1983, plaintiff filed a charge of discrimination against HAC (numbered 092831489) (the "Charge") with the Equal Employment Opportunity Commission (the "EEOC") at its District Office in Los Angeles, California. Plaintiff claimed therein that he was "discharged" by HAC in June 1983, denied in-house transfers prior thereto, denied salary increases, and harassed because of his race.

4. On June 4, 1984, plaintiff received a statutory "right-to-sue" letter from the EEOC, at which time the

EEOC terminated further processing of plaintiff's charge without reaching a decision on the merits.

[Plaintiff's Initial Period of Employment]

5. Plaintiff was hired by HAC on June 2, 1975 as a Student Engineer 2. This job classification was used for employees working on HAC-approved work-study schedules while enrolled in an accredited college or university program leading to a B.S. degree in engineering. At the time he was hired, plaintiff was enrolled at UCLA extension in an engineering program. However, plaintiff never obtained his B.S. degree during the eight years he was employed with HAC. HAC's records show that plaintiff took only two courses at UCLA, obtaining a grade of C in each; UCLA records reveal that plaintiff received poor or failing grades in several other courses.

6. Prior to commencing work with HAC, plaintiff had taken college-level courses at the University of Maryland, where he received poor and failing grades in some classes and was academically dismissed three times. Plaintiff misrepresented his academic standing at the University of Maryland on the employment application he submitted to HAC.

7. Plaintiff began work in HAC's Field Support and Services Division (Division 28) located at HAC's Airport Site. His initial assignment involved writing and running computer test programs for an automated test station, using the Basic computer language. Plaintiff's supervisor on this project, Mr. Phil Highducheck, was generally satisfied with plaintiff's work, and gave him an overall rating of average on a written performance appraisal completed in early 1976.

8. When this program was terminated in the fall of 1976, plaintiff transferred to HAC's Electro-Optical and

Data Systems Group, located in El Segundo, California. Plaintiff joined an engineering department responsible for the automatic test equipment used to test the guidance system on the MK-5 missile. Plaintiff helped to write computer programs designed to test various modules on this automatic test station, using a computer test language called Atlas. Plaintiff's first supervisors on this project, Messrs. Dominick Cardella and Robert Lemestre, gave plaintiff an overall rating of slightly above average on written performance appraisals completed in March 1977, but noted that plaintiff was progressing at a slow pace and that his punctuality and attendance "left something to be desired." Lemestre discussed these appraisals with plaintiff in March 1977, and advised plaintiff that he was expected to correct his attendance problems.

9. On October 20, 1977, plaintiff was warned in writing about his attendance problems by Mr. Earl Peay, Manager of the MK-5 automatic test equipment department. Plaintiff's supervision noted in this written warning that plaintiff had been verbally warned on several earlier occasions that he should correct his habit of arriving late and leaving early. Plaintiff received a copy of this written warning, which advised him that failure to correct his poor work habits could lead to further discipline, including suspension or discharge. Plaintiff continued to have attendance problems during the time he worked in this organization.

10. In early 1978, Mr. Ronald Fong, then plaintiff's immediate supervisor in the MK-5 automatic test equipment department, completed another written performance appraisal of plaintiff. Fong rated plaintiff as somewhat below average overall. In this appraisal, which was also discussed with plaintiff, Fong noted that plaintiff needed to gain additional experience and obtain his B.S. degree

in engineering to improve his work performance. Plaintiff was also advised to take more initiative in seeking work and added responsibilities.

11. In the fall of 1978, plaintiff requested and was given permission by his supervision to look for another position within HAC. In October 1978, plaintiff obtained a position with the Radar Design Automation Center, part of HAC's Radar Systems Group. The Radar Design Automation Center was a new organization set up to provide computer-aided design services to Radar Systems Group engineers.

12. Plaintiff remained in the Radar Design Automation Center for only about one month.

13. In early 1979, plaintiff obtained another position within Radar Systems Group. Plaintiff continued to have problems with his attendance in this organization. He was verbally counseled and warned about coming to work late on more than one occasion, but still failed to correct this problem. After this incident, plaintiff asked for permission to transfer to another position within HAC, which was granted.

[Plaintiff's Employment with the Space and Communications Group and Subsequent Layoff]

14. During the remainder of his employment with HAC, plaintiff worked at HAC's Space and Communications Group on the Ku-Band program. Generally speaking, this program involved the design, development and testing of a special radar and communications systems ultimately used in the NASA space shuttles. Plaintiff was involved in various projects associated with the testing of this system. Plaintiff initially reported to Mr. Bing Chin, Senior Project Engineer, and was assigned to help with

initial testing of the first Ku-Band system, and of a field test set designed to test that system once it was installed on the space shuttle.

15. In September 1980, Chin completed a written evaluation of plaintiff's work performance, rating it as generally satisfactory. However, Chin noted several specific areas in which plaintiff should improve his performance, the first of which was punctuality and attendance. Chin also suggested that plaintiff work on improving his interactions with co-workers, and that he take more initiative in understanding his assignments and determining what steps were required to complete his assigned tasks. Chin discussed this review with plaintiff.

16. In the latter part of 1980 and the first part of 1981, plaintiff was on staff to the Systems Engineering Manager for the Ku-Band program. Plaintiff was given the responsibility of documenting specifications and learning test requirements for one of the units that made up the Ku-Band system, the Electronic Assembly 2 (EA-2) unit. Plaintiff reported to Mr. Frank Joyce and then Mr. Lance Mohler during this period of time. Plaintiff continued to exhibit attendance problems and problems interacting with co-workers during this period.

17. In August 1981, while working on the EA-2 unit test procedures, plaintiff again demonstrated his lack of dependability by failing to advise his supervisor of vacation plans in advance of taking vacation. Instead, plaintiff called in to request vacation on a daily basis for a week, causing a delay in test procedures.

18. On August 25, 1981, plaintiff received a written warning for poor attendance and tardiness from his then supervisor, Mr. Don Sugden. Plaintiff was reminded that he had been directed to keep regular working hours and

to advise the engineer in charge of test procedures of his whereabouts so that test schedules could be drawn up and met. A log maintained by supervision showed that plaintiff repeatedly arrived late or not at all during the seven-week period preceding this warning.

19. On September 30, 1981, Mr. Jerry Ruysser, the engineer in charge of the above test procedures, completed a written evaluation of plaintiff's work. Ruysser rated plaintiff as an average performer with one bad trait. Ruysser noted that plaintiff was constantly late to work, would leave the work area for lengthy periods of time without advising supervision of his whereabouts, and was frequently absent for the entire day without advance notice. Ruysser noted that plaintiff needed to correct these poor work habits if he was going to progress in the engineering field, because supervision could not rely on him so long as such habits persisted. Ruysser discussed this evaluation with plaintiff in October 1981.

20. Sometime in late 1981, Mr. Thomas Tong replaced Sugden as the Senior Engineer in charge of the Ku-Band test operations. Tong endeavored to give plaintiff a "fresh start" under his supervision. In early March 1982, Tong completed a written appraisal of plaintiff's performance, rating him as a slightly above average in overall performance and commenting positively on plaintiff's work. It was Tong's hope that such positive reinforcement would have a positive effect on plaintiff's work habits.

21. By late May 1982, Tong was still satisfied with plaintiff's performance, to the extent that he recommended plaintiff for a special salary increase. However, before the processing on this recommendation had been completed, Tong learned of further instances of work problems on the part of plaintiff (as set forth below),

which led Tong to put a "hold" on the special increase pending plaintiff's correction of these problems.

22. In July 1982, Mr. Gerald Hermann was in charge of certain test procedures for the Ku-Band program, and plaintiff was assigned by Tong to work under Hermann's direction. At this time, Hermann reported to Tong that plaintiff had been misstating the number of hours he worked on his time cards. While plaintiff and the other technical staff who worked on the Ku-Band program were not hourly employees and therefore did not have to punch a time card, they were responsible for filling out a daily time card to verify the number of hours they worked on a project for accounting purposes. As a defense contractor, HAC was required to maintain such records. Hermann reported to Tong that he had spoken to plaintiff on several occasions about arriving late, leaving early and then overstating his hours (including claiming overtime) on his time cards. Like a number of supervisors before him, Hermann was also concerned that he could not depend on plaintiff when tests were being run.

23. In response to the above reports, Tong met with plaintiff on July 23, 1982 to advise him to correct such work habits. Plaintiff took the position that he was falsely accused and that he was working extended hours each day. Tong memorialized this meeting in a memorandum to plaintiff dated August 2, 1982, stating that the memorandum would not be placed in plaintiff's personnel file unless continued monitoring of his attendance showed that plaintiff was tardy or absent in the future. Tong also told plaintiff in this meeting that he would recommend reinstatement of plaintiff's special salary increase if plaintiff did not have attendance problems in the future.

24. Plaintiff did not meet the performance standards set by Tong in the above meeting. During August 1982,

plaintiff was assigned to work at the Baldwin Hills Antenna Range as a member of the team conducting system tests for the Ku-Band program. These tests were run with two shifts per day for six days a week. Again, punctuality and attendance on the part of each team member was critical to the successful and timely completion of the tests. According to the gate guard's records of plaintiff's check-in and check-out times at the test location, plaintiff was habitually late to work during this time period. The supervisors in charge at the Baldwin Hills test operations and the test team leaders confirmed that plaintiff continued to have attendance problems during this time period, that he misstated the number of hours worked on his time cards, and that he had difficulty working with other team members.

25. As a result of plaintiff's continued attendance problems and inability to get along with co-workers, Tong concluded that he no longer required plaintiff's services on the Ku-Band program. Thus, on September 22, 1982, plaintiff was advised in a meeting and in writing that he should look for alternative employment within or outside of HAC because of his poor work habits. HAC made its Career Opportunity Program available to plaintiff to assist him in identifying and applying for openings within HAC.

26. By November 1982, plaintiff had not succeeded in finding other employment with HAC. At this time, Tong temporarily assigned plaintiff to work for Mr. Paul Sterba in the Ku-Band program office. On February 17, 1983, Sterba evaluated plaintiff's performance in a memorandum to Tong. Sterba reported that plaintiff was consistently tardy and absent from his work station despite counseling from Sterba, and that he had problems completing certain work assignments.

27. On February 23, 1983, Tong met with plaintiff and gave him another written warning about his attendance and poor work performance. Plaintiff was warned that continued unsatisfactory performance would result in further discipline, including suspension or discharge. Plaintiff was also advised of his new assignment, which would be reporting to Messrs. Ed Kulyeshie and Roger May to assist with certain Ku-Band test procedures.

28. May and Kulyeshie provided plaintiff with his work assignments during the next several months. They observed that plaintiff continued to have attendance problems, and that he failed to report when he would be absent from the work area, as directed to do so by Tong. Consequently, on March 14, 1983, Tong suspended plaintiff without pay for three days. Even after this disciplinary suspension, plaintiff failed to correct his deficient work habits.

29. After he was suspended, plaintiff filed an internal complaint with HAC's Human Resources organization. Ms. Elaine Harrell, an Employee Relations representative, investigated plaintiff's complaint that he had been unjustly suspended, interviewing plaintiff and his supervision. Harrell found no basis for concluding that plaintiff's management had acted improperly. She also assisted plaintiff with his efforts to secure a transfer to another position.

30. In March 1983, Tong completed a written performance appraisal of plaintiff's performance during the past year. Tong rated plaintiff as less than "barely acceptable" overall, noting that plaintiff had been warned repeatedly about poor work habits with no discernable results. Tong discussed this appraisal with plaintiff.

31. By June 1, 1983, plaintiff's supervision decided that plaintiff would be laid off by June 17, 1983 if he had not found alternative employment with HAC before such time. This decision was reached in light of the scheduled phase-down of the Ku-Band program, the lack of appropriate assignments for plaintiff, and plaintiff's poor work habits. Plaintiff was advised of this decision in a meeting with his supervision on June 2, 1983.

32. Plaintiff failed to obtain another position with HAC prior to June 17, 1983, and on that date, he was laid off. Another individual who worked on the Ku-Band program was on personal leave at this time and was subsequently laid off because of poor performance. This engineer was white. Plaintiff was not replaced after he was laid off. Plaintiff was not selected for layoff because of his race, and HAC did not discriminate against plaintiff by laying him off or disciplining him as set forth above. Each of the aforementioned supervisors denied discrimination and this Court *strongly* believes them.

[Plaintiff's Attempts to Transfer Within HAC]

33. When plaintiff was advised by his supervision in the Ku-Band program to look for other work within HAC, he utilized HAC's Career Opportunity Program to identify openings at other HAC facilities. Plaintiff filled out applications for a number of engineering positions, which were forwarded to the appropriate hiring supervisor for his or her consideration. Plaintiff was not selected for any of these openings.

34. HAC did not discriminatorily interfere with plaintiff's efforts to secure a transfer to another position. Rather, plaintiff was not selected for the other positions he sought for a number of legitimate reasons. In at least one instance, the opening was withdrawn and no one was

hired because the project was phased out. In other instances, there were no openings for plaintiff's desired work. Plaintiff also lacked necessary experience and/or educational qualifications for a number of positions for which he applied. During at least one interview, plaintiff misrepresented himself as an "MTS," a Member of HAC's Technical Staff, which is a job classification used only for employees who have an engineering or other hard-science degree or at least 10 years of equivalent technical work experience. Plaintiff was never qualified to be an MTS while he was employed at HAC, and he was never classified as such by HAC. Note should be made that when the plaintiff sought relocation certain negative evaluations from the Ku-Band supervisors was purposely withheld from the personnel file.

[Plaintiff's Salary History]

35. When plaintiff was hired in June 1975, he was classified as a Student Engineer 2, and earned $200 per week.

36. HAC's salaried employees are normally reviewed annually by supervision for the purpose of determining whether they will receive a salary increase, and if so, the amount thereof. These increases are not automatic, but are based on the employees' performance and on HAC's financial status, which determines the total amount available in the "merit pool." These increases are given out in March of each year. In addition, special increases or adjustments may be awarded outside the annual review cycle in order to, for example, recognize outstanding performance, alleviate rate inequities, or recognize added responsibilities corresponding to a promotion.

37. In March 1976, plaintiff received an annual increase of $10 per week (5 percent), bringing his weekly salary to $210.

38. In March 1977, plaintiff received an annual increase of $20 per week (9 percent), bringing his weekly salary to $230.

39. In March 1978, plaintiff received an annual increase of $17 per week (7 percent), bringing his weekly salary to $247.

40. In March 1979, plaintiff received an annual increase of $25 per week (10 percent), bringing his weekly salary to $272.

41. In March 1980, plaintiff received an annual increase of $53 per week (19 percent), bringing his weekly salary to $325.

42. In March 1981, plaintiff received an annual increase of $33 per week (10 percent), bringing his weekly salary to $358.

43. In December 1981 and at plaintiff's request, his supervision in the Ku-Band program approved a special increase and promotional reclassification for plaintiff. Plaintiff had been classified as a Student Engineer for six years due to his inability to obtain a B.S. degree in engineering, which would have enabled him to be reclassified as an MTS. In order to better recognize plaintiff's work experience, and because it appeared that plaintiff would not finish his program of studies leading to an engineering degree, his supervision agreed to a $92 increase (26 percent) in salary and a promotion to the non-MTS position of Test Engineer 1. After this increase, plaintiff's salary was $450 per week.

44. Because plaintiff had received such a large increase in December 1981, he did not receive an additional salary increase in March 1982.

45. In August 1982, plaintiff received a $20 increase (4 percent) in salary from his supervision in the Ku-Band program, bringing his weekly salary to $470. While by this time plaintiff's supervision had serious concerns about his work performance in general and attendance problems in particular, plaintiff assured his management that he would correct these problems and that he would respond well to the financial incentive of a salary increase. HAC therefore decided to give plaintiff the benefit of the doubt and to try to obtain improvement in his work performance with some "positive reinforcement." HAC elected to give plaintiff a small increase at this time, with the idea that he would receive an additional increase in March 1983 if he performed well during the interim and corrected his attendance problems.

46. Plaintiff was passed over for an increase in March 1983 because of his inadequate work performance.

47. Plaintiff did not suffer salary discrimination during his employment with HAC. Plaintiff's race was not a factor in decisions made by his supervision concerning his salary and salary increases.

[Plaintiff's Alleged Harassment]

48. HAC did not harass plaintiff because of his race. None of plaintiff's supervisors made derogatory racial comments to or about plaintiff, or sent any derogatory material to plaintiff. Although on one occasion plaintiff received an arguably derogatory document in the interoffice mail, plaintiff never brought this document to his supervisors' attention or complained of any other alleged

acts of harassment against him. Plaintiff's supervisors were never aware of any such alleged harassment.

II

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action, in which plaintiff alleges that HAC violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981").

2. The standards for establishing an individual disparate treatment claim under Title VII also apply to a similar claim under Section 1981. *Gay v. Waiters' Union, Local 30*, 694 F.2d 531 (9th Cir. 1982); *Tagupa v. Board of Directors*, 633 F.2d 1309 (9th Cir. 1980).

3. Plaintiff has the burden of proving a *prima facie* case of race discrimination in connection with HAC's decision to lay him off in June 1983 and failure to select him for another position within HAC prior thereto. The order and allocation of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) can be applied to claims of other types of discrimination, such as a layoff or failure to transfer claim. *Grubb v. W. A. Foote Memorial Hospital*, 714 F.2d 1486 (6th Cir. 1984), *rehearing granted and vacated on other grounds*, 759 F.2d 546 (6th Cir. 1985).

4. In order to establish a *prima facie* case of race discrimination in connection with his layoff, plaintiff must prove that he was black; that he was qualified for the job he was performing; that, although he was performing satisfactorily, he was laid off; and that after his layoff, someone with comparable qualifications performed the same work. *Grubb v. W. A. Foote Memorial Hospital*, *supra*;

Hobson v. Western Airlines, 25 FEP Cases 1509, 1515 (N.D. Cal. 1980).

5. Plaintiff failed to prove the above *prima facie* case, in that plaintiff failed to prove that he was performing satisfactorily when he was laid off or that he was replaced. *Yeh v. System Development Co.*, 23 FEP Cases 1810 (C.D. Cal. 1978), *aff'd*, 614 F.2d 778 (9th Cir.), *cert. denied*, 449 U.S. 824, 101 S. Ct. 85 (1980).

6. Even assuming for the sake of argument that plaintiff established a *prima facie* case of race discrimination in connection with HAC's decision to lay him off, HAC met its burden of producing evidence of non-discriminatory reasons for its conduct. HAC demonstrated that it selected plaintiff for layoff because the Ku-Band project was phasing down and because plaintiff was not adequately performing his job duties and had a long history of serious attendance problems.

7. In order to show a *prima facie* case of race discrimination in connection with HAC's failure to offer him a transfer position, plaintiff must prove that he applied and was qualified for a job that HAC was trying to fill; that although qualified, he was rejected; and that thereafter the position remained open and HAC continued to seek applicants with plaintiff's qualifications. *Thorne v. City of El Segundo,* 726 F.2d 459 (9th Cir. 1983), *cert. denied,* ____ U.S. ____, 105 S. Ct. 380 (1984); *McDonnell Douglas Corp. v. Green, supra.*

8. Plaintiff failed to prove the above *prima facie* case, in that plaintiff failed to prove that he was qualified for the positions he sought, that such positions remained open, or that HAC continued to seek candidates from persons of his qualifications.

9. Even assuming for the sake of argument that plaintiff established a *prima facie* case of race discrimination in connection with HAC's failure to offer plaintiff a transfer position within HAC, HAC met its burden of producing evidence of non-discriminatory reasons for its conduct. HAC showed that plaintiff was not selected for the positions for which he applied because the positions were withdrawn or because plaintiff was not qualified for such positions or was not the best candidate in light of past experience and performance.

10. Plaintiff failed to carry his burden or proving that HAC's articulated reasons for its conduct in not selecting plaintiff for a transfer opening were pretext for a discriminatory motive based on plaintiff's race. *Texas Department of Community Affairs v. Burdine,* 540 U.S. 248, 101 S. Ct. 1089 (1981); *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24, 99 S. Ct. 295 (1978).

11. Plaintiff has the burden of proving a *prima facie* case of race discrimination in connection with the salary decisions made by HAC in 1982 and 1983. In order to establish such a *prima facie* case, plaintiff must prove that HAC paid him less than white employees for substantially equal work in terms of the skill, efforts and responsibility required. *Gunther v. County of Washington,* 633 F.2d 1303 (9th Cir. 1979), *aff'd,* 452 U.S. 161, 101 S. Ct. 2242 (1981).

12. Plaintiff failed to prove the above *prima facie* case, in that plaintiff failed to prove that he received salary increases less than those received by white employees performing substantially equal work in terms of the skill, efforts, and responsibility required.

13. Even assuming for the sake of argument that plaintiff established a *prima facie* case of race discrimina-

tion in connection with the salary decisions made by HAC in 1982 and 1983, HAC met its burden of producing evidence of non-discriminatory reasons for its conduct. HAC demonstrated that the differences in salary increases among employees on the Ku-Band project were the result of HAC's merit system of salary administration and significant differences between the quality of the various employees' performances. In particular, HAC demonstrated that plaintiff was not performing satisfactorily and had a long history of serious attendance problems.

14. Plaintiff failed to carry his burden of proving that HAC's articulated reasons for its conduct were pretext for a discriminatory motive based on plaintiff's race. *Texas Department of Community Affairs v. Burdine, supra; Board of Trustees of Keene State College v. Sweeney, supra.*

15. In order to prevail on a claim of discriminatory harassment, plaintiff must prove that he was subjected to a continuing and extensive course of harassment because of his race, that HAC was aware of such harassment, and that HAC failed to take reasonable steps to remedy such harassment. *Silver v. KCA, Inc.,* 586 F.2d 138 (9th Cir. 1978); *DeGrace v. Rumsfield,* 614 F.2d 796 (1st Cir. 1980); *Gairola v. Virginia Department of General Services,* 753 F.2d 1281 (4th Cir. 1985).

16. Plaintiff failed to prove a continuing and extensive course of harassment directed against him because of his race, or that any of his supervisors at HAC were aware of alleged harassment by co-employees which they failed to remedy. Plaintiff's receipt of a single derogatory document sent anonymously through the intra-office mail is insufficient to establish a continuing and extensive course of harassment, and plaintiff never complained to his supervision regarding this or any other alleged harass-

ment by his co-workers. HAC was unaware of plaintiff's receipt of the derogatory document or any other alleged harassment suffered by plaintiff.

17. Plaintiff did not establish any violation of Title VII or Section 1981 by defendant HAC and, therefore, plaintiff is not entitled to any relief whatsoever in this action.

18. HAC is entitled to judgment against plaintiff on plaintiff's complaint. HAC is also entitled to recover from plaintiff its costs of suit and reasonable attorneys' fees incurred herein. Section 706(k) of Title VII; *Christianburg Garment Co. v. Equal Employment Opportunity Commission,* 434 U.S. 412, 98 S. Ct. 694 (1978); *N.O.W. v. Bank of California,* 680 F.2d 1291 (9th Cir. 1982).

Each of the foregoing findings of fact which may be construed as a conclusion of law is hereby deemed to be a conclusion of law, and each of the foregoing conclusions of law which may be construed as a finding of fact is hereby deemed to be a finding of fact.

DATED: December 5, 1985

/s/ WILLIAM D. KELLER
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID BERRY'AN,
Plaintiff-Appellant,
vs.
HUGHES AIRCRAFT COMPANY, a corporation, THOMAS W. TONG, an individual, A. H. RUYSSER, an individual, EDWARD KULYESHIE, an individual, GERALD HERMANN, an individual, and DOES 1 through 10,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Honorable William D. Keller, District Judge, Presiding
Submitted: December 12, 1986
San Francisco, California**
Filed: March 19, 1987

No. 86-5521

DC No. CV 84-6158-WDK

MEMORANDUM *

Before: BARNES, SKOPIL, and CANBY, Circuit Judges.

The district court's judgment is affirmed. Berry'an failed to establish the ultimate issue of discrimination with respect to all or any of his Title VII claims and,

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and 9th Cir. Rule 3(f).

therefore, the district court's judgment was not clearly erroneous. *See Casillas v. United States Navy,* 735 F.2d 338, 343-44 (9th cir. 1984). Moreover, this action was based on frivolous grounds and, therefore, the district court did not abuse its discretion in awarding Hughes attorneys fees. *See Mitchell v. Los Angeles County Superintendent of Schools,* 805 F.2d 844, 847-48 (9th cir. 1986).

Berry'an was hired by Hughes Aircraft Company ("Hughes") on June 2, 1975 and worked for four divisions within Hughes before his termination. At the time Berry'an was hired, he made misrepresentations about his academic credentials. While employed at Hughes, Berry'an received verbal and written warnings about his attendance and work habits.[1] He was warned that he would be terminated if he did not improve his allegedly poor work habits.

On September 22, 1982, Berry'an was asked to seek alternative employment within or outside Hughes. Thereafter, he applied for employment in other departments within Hughes and also for employment outside Hughes. Hughes did not transfer him to another department. While seeking another job, Berry'an applied for jobs beyond his qualifications.

On March 14, 1983, Berry'an was suspended for three days without pay for continued failure to correct his allegedly poor work habits. Berry'an filed a complaint with Hughes and after an investigation, a Hughes Em-

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[1]Berry'an was warned to correct his deficient work habits as follows: appraisal report by Cardella and Lemestre, March 1977; appraisal report by Peay, October 1977; appraisal report by Chin, September 1980; written warning by Sugden, August 1981; appraisal report by Ruysser, September 1981; appraisal report by Tong, July 1982, Memorandum to Tong by Sterba, February 1983, written warning by Tong, February 1983.

ployee Relations Representative concluded that his suspension for poor attendance was justified. Thereafter, Hughes' management decided to discharge Berry'an if he did not find alternative employment before June 17, 1983.

Several weeks after his suspension, Berry'an received an allegedly derogatory newspaper excerpt through Hughes' interoffice mail.

From 1976 to 1982, Berry'an received an annual weekly salary increase. His salary increase averaged approximately ten percent each year. In May 1982, Berry'an was promoted and awarded a special salary increase of twenty-six percent.

Hughes discharged Berry'an on June 18, 1983. He filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) in July 1983. In June 1984, the EEOC issued Berry'an a right to sue letter. On August 8, 1984, Berry'an filed a pro se complaint against Hughes. After a bench trial, the district court granted judgment for Hughes, and adopted Hughes' proposed findings of fact and conclusions of law. On February 21, 1986, the district court granted Hughes' motion for $10,000 in attorneys fees. Berry'an timely appeals.

There are two issues before this court:

1. Did the district court clearly err in failing to find that Hughes racially discriminated against Berry'an?

2. Did the district court abuse its discretion in awarding Hughes attorney fees?

On each issue we hold there was no error.

I

Discrimination Claims

A. Standard of Review

Since this case was fully tried, we review the district court's factual findings as to Title VII discrimination under the clearly erroneous standard. *Casillas*, 735 F.2d at 342. Appellate review focuses not upon whether the prima facie case was established but upon the ultimate question of discrimination. *Id.* at 343-44. The ultimate burden of proof, despite shift in the burden of production, remains with the employee. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

B. Termination

Berry'an contends that he was terminated because of his race and that he has established the prima facie requirements for discriminatory discharge. He states that he is a member of the black race. He argues he was a satisfactory employee when discharged and that he was replaced by a white worker. Moreover, Berry'an asserts that Hughes fabricated evidence of tardy attendance and deficient work habits.

To establish a prima facie case of discriminatory discharge, Berry'an must prove that he belongs to a racial minority, that he was performing satisfactorily when he was terminated, and that Hughes sought a replacement with qualifications similar to his own. *Sengupta v. Morrison-Knudsen Co., Inc.*, 804 F.2d 1072, 1075 (9th cir. 1986).

The district court properly found that Berry'an was neither performing satisfactorily nor replaced. Other than his own testimony, Berry'an offered no evidence that Hughes falsely altered his records. Hughes' personnel file

on Berry'an chronicled the numerous warnings he received concerning his deficient work habits. In addition, Berry'an misstated his time cards and had difficulty working with others. Moreover, Hughes did not attempt to replace Berry'an. Thus, Berry'an did not satisfy the requirements for establishing discriminatory termination. *See id.*

C. Transfer

Berry'an contends that he applied for numerous positions within Hughes but was denied a transfer because of his race. He states that he was qualified for the position for which he applied. In addition, Berry'an states that Hughes, after refusing his application, continued to seek applications from persons with his same qualifications.

To establish a prima facie case of discrimination, Berry'an was required to show that he belongs to a racial minority, that he applied for a position for which he was qualified, that he was rejected, and that thereafter the position remained open and that Hughes continued to seek applicants with qualifications similar to his own. *Mitchell*, 805 F.2d at 846 (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973)). Alternatively, Berry'an may establish a prima facie case by offering evidence that creates an inference that Hughes based its employment decision on discriminatory criteria. *Id.* (citing *Teamsters v. United States*, 431 U.S. 324, 358 (1977)). Once Berry'an establishes a prima facie case, Hughes' burden is to articulate a legitimate nondiscriminatory reason for rejecting Berry'an. *Id.* Then Berry'an must prove that Hughes' articulated reason was a pretext. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 807).

The district court properly found that Hughes did not deny Berry'an a transfer position because of his race. The

record reveals that Berry'an either was not qualified for the positions for which he applied or that the positions were closed. Moreover, even if he had established a prima facie case, Hughes' articulated reason for not selecting Berry'an was not pretext because Berry'an was an unsatisfactory employee.

D. Equal Pay

Berry'an alleges that salary decisions made by Hughes in 1982 and 1983 were based on race. He also states that he performed tasks at a level higher than that for which he was paid.

In his wage discrimination claim, however, Berry'an failed to establish the ultimate issue of race discrimination. *See EEOC v. Inland Marine Industries*, 729 F.2d 1229, 1234 (9th Cir.), *cert. denied*, 469 U.S. 855 (1984). Even though his assigned duties were greater than his classification requirements, Hughes awarded Berry'an lower salary increases because he was not dependable, not punctual, and maintained generally poor work habits.

E. Harassment

Berry'an contends he suffered a continuing and extensive course of harassment of which Hughes was aware and failed to take reasonable steps to remedy. He alleges that he was harassed because: (1) he received a derogatory newspaper excerpt; (2) he was suspended; and (3) his supervisor recommended that he not be rehired. He also argues that he was continually harassed regarding his work habits.

To succeed on a claim of discriminatory harassment, Berry'an must prove that he was subjected to a continuing and extensive course of harassment, and that Hughes

failed to take reasonable steps to remedy the harassment. *Silver v. KCA, Inc.,* 586 F.2d 138, 141-42 (9th Cir. 1978).

Except for his own testimony, Berry'an has offered no evidence that Hughes falsely accused him of maintaining deficient work habits. Hughes, however, presented testimony of numerous witnesses supporting the allegation that Berry'an maintained poor work habits. In addition, after conducting an investigation an employee representative found Berry'an's suspension justified. Therefore, the suspension and recommendation do not show that Berry'an was harassed. Moreover, although Berry'an received a derogatory newspaper excerpt through Hughes' interoffice mail, he concedes that he received no other derogatory documents and that he heard no derogatory remarks while employed by Hughes. Thus, because Berry'an was not subjected to extensive or continuous harassment, he has not established a claim for harassment.

II

Attorney Fees

The award of attorney fees falls within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Mitchell,* 805 F.2d at 846.

In requesting attorney fees on appeal, Berry'an implicitly argues that Hughes was not entitled to attorney fees below.[2]

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[2]Berry'an argues that he is entitled to attorney fees on appeal because he has established various Title VII and 42 U.S.C. § 1981 violations. As previously discussed, however, Berry'an has failed to establish the ultimate issue of discrimination, and therefore, because he is not a prevailing party he is not entitled to attorney fees on appeal. 42 U.S.C. § 2000e-5(k). Hughes does not seek attorney fees at

Attorney fees may be awarded against a plaintiff in a Title VII case where the district court finds the claim "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christianburg Garmet Co. v. EEOC,* 434 U.S. 412, 422 (1978); *Mitchell,* 805 F.2d at 847-48.

Here, the district court properly awarded Hughes attorney fees. Berry'an based his action on frivolous grounds and misrepresentations. He misrepresented his qualifications and credentials, and misstated his time cards. Since this action resulted in the needless expenditure of litigation expenses, the district court did not abuse its discretion in awarding Hughes attorney fees. *See id.*

The district court's judgment is AFFIRMED.

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this time but states that if it prevails on appeal it may seek fees pursuant to 42 U.S.C. § 2000e-5(k).1.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 21, 1987, I served the within Brief in Opposition in re: "David Berry'an vs. Hughes Aircraft Company" in the United States Supreme Court, October Term 1987, No. 87-512;

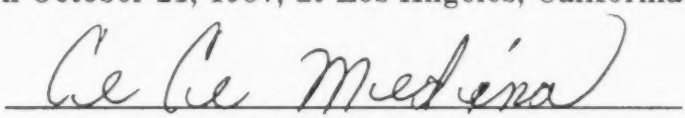
On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

David Berry'an
606 Levering Avenue #216
Los Angeles, California 90024

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 21, 1987, at Los Angeles, California



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